

Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of allotments,)
FM Broadcast Stations)
(Detroit, Howe and Jacksboro,)
Texas, Anglers and Hugo, Oklahoma)

MM Docket No. 97-26
RM-8968
RM-9089
RM-9090

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of allotments,)
FM Broadcast Stations)
(Lewisville, Gainesville, Robinson,)
Corsicana, Jacksboro, and)
Mineral Wells, Texas))

MM Docket No. 97-91
RM-8854
RM-9221

To: The Commission

**COMMENTS REGARDING MOTION FOR LEAVE TO FILE SUPPLEMENT
AND SUPPLEMENT TO OPPOSITION TO APPLICATIONS FOR REVIEW**

Jerry Snyder and Associates, Inc. ("Snyder"), by its counsel, hereby respectfully submits its Comments regarding Heftel Broadcasting Corporation's ("Heftel") Motion for Leave to File Supplement and Supplement to Opposition to Applications for Review (the "Motion").¹

*Ottumwa*² does not stand for the legal proposition for which Heftel cites it. In fact, *Ottumwa* fully supports Snyder's legal argument in Snyder's Application for Review. Thus,

¹Heftel's Motion having been served by mail on October 29, 1998, pursuant to 47 C.F.R. §§ 1.4 and 1.45, this pleading is due to be filed no later than November 11, 1998.

²*FM Allotments-Galesburg, Illinois and Ottumwa, Iowa*, DA 98-2068 (Chief, Allocations Branch), released October 16, 1998. ("*Ottumwa*").

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despite the prohibition of Section 1.45(c)³ to such an unauthorized pleading, Snyder has no objection to the Commission's consideration of *Ottumwa* in the review process.

In this proceeding, Snyder filed an application for the C1 channel already allotted to Mineral Wells⁴ and to which Snyder's station KYXS-FM had been modified (FCC File No. BPH-961125IG, accepted on January 21, 1997.⁵) Snyder did not file a "one-step" application to upgrade the channel⁶ to a full C allotment.

In *Ottumwa*, the facts are very different. The allotment to Ottumwa was a C3 allotment. Had KTWa refiled its application for the C3 allotment,⁷ then it could have done so without being considered a counterproposal. As *Ottumwa* notes at ¶ 5:

One reason for this determination is the fact that in MM Docket No. 98-365 we, in fact, modified the station KTWa to a Class C station. That action is final and the Channel 224C3 allotment is set forth in the FM Table of Allotments.⁸

But KTWa did not file for a Class C3 channel, but rather filed for a further upgrade of the Ottumwa allotment from Class C3 to Class C2. While KTWa was operating as if it were a Class A facility, because its license had been modified to a Class C3 facility this is the status that

³In *Llevandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1998) the D.C. Circuit Court stressed the importance of Section 1.45(c) in bringing "orderliness and predictability (and finality) to the litigation process."

⁴*FM Allotments-Mineral Wells*, FCC Rcd. 1791 (1992) ("*Mineral Wells*").

⁵Snyder refiled its application because it had previously lost site availability.

⁶As did the license of KTWa in *Ottumwa*.

⁷KTWa's construction permit to upgrade from a Class A to a Class C3 facility had expired some years before KTWa filed its application for Class C2 facilities.

⁸So too in *Mineral Wells*, the FCC modified Snyder's station KYXS's license "to specify operation on Channel 240C1" and amended the Table of allotments to specify 240C1 as allotted to Mineral Wells.

the *Order* applied in *Ottumwa*. See ¶ 5. That upgrade is what required the KTWa application to be considered as a counterproposal in the *Ottumwa* rulemaking proceeding.

Snyder's application was for a construction permit for the Class C1 allotment already allocated to Mineral Wells and thus should not have been considered as a counterproposal in this proceeding. Thus, not only is *Ottumwa* inapposite to the legal argument made by Heftel in the Motion, but to the contrary *Ottumwa* supports Snyder's legal argument in its Application for Review.⁹

Respectfully submitted,

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By: 

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November 5, 1998

⁹Indeed, *Metro-Broadcasters-Texas, Inc.* cited *Ottumwa* for this proposition at p.3, n.3 of its Reply to Heftel's opposition to the Application for Review filed October 22, 1998, stating, "In *Galesburg*, a construction permit for an upgrade from Channel 224A to Channel 224C3 expired on August 26, 1992, and was canceled on November 18, 1992. Nevertheless, the Branch stated that the Class C3 upgrade was final, was protected in the Commission's data base, and, despite the cancellation of the C3 permit nearly six years ago, there was nothing to prevent the licensee of the currently-operating Class A station from filing a minor change application to implement the Class C3 license modification. *Id.* at ¶5."

CERTIFICATE OF SERVICE

I, Angela Y. Powell, a paralegal in the law firm of Smithwick & Belendiuk, P.C., hereby certify that on the 5th day of November, 1998, copies of the foregoing were mailed first-class, postage prepaid, to the following:

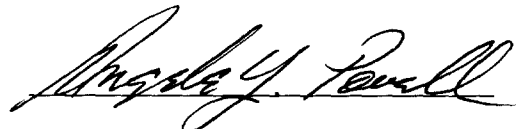
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